SUPREME COURT, U. S.

FILED

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ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 444

MRS. ROBERT LEE MOORE, ET AL,

Appellants

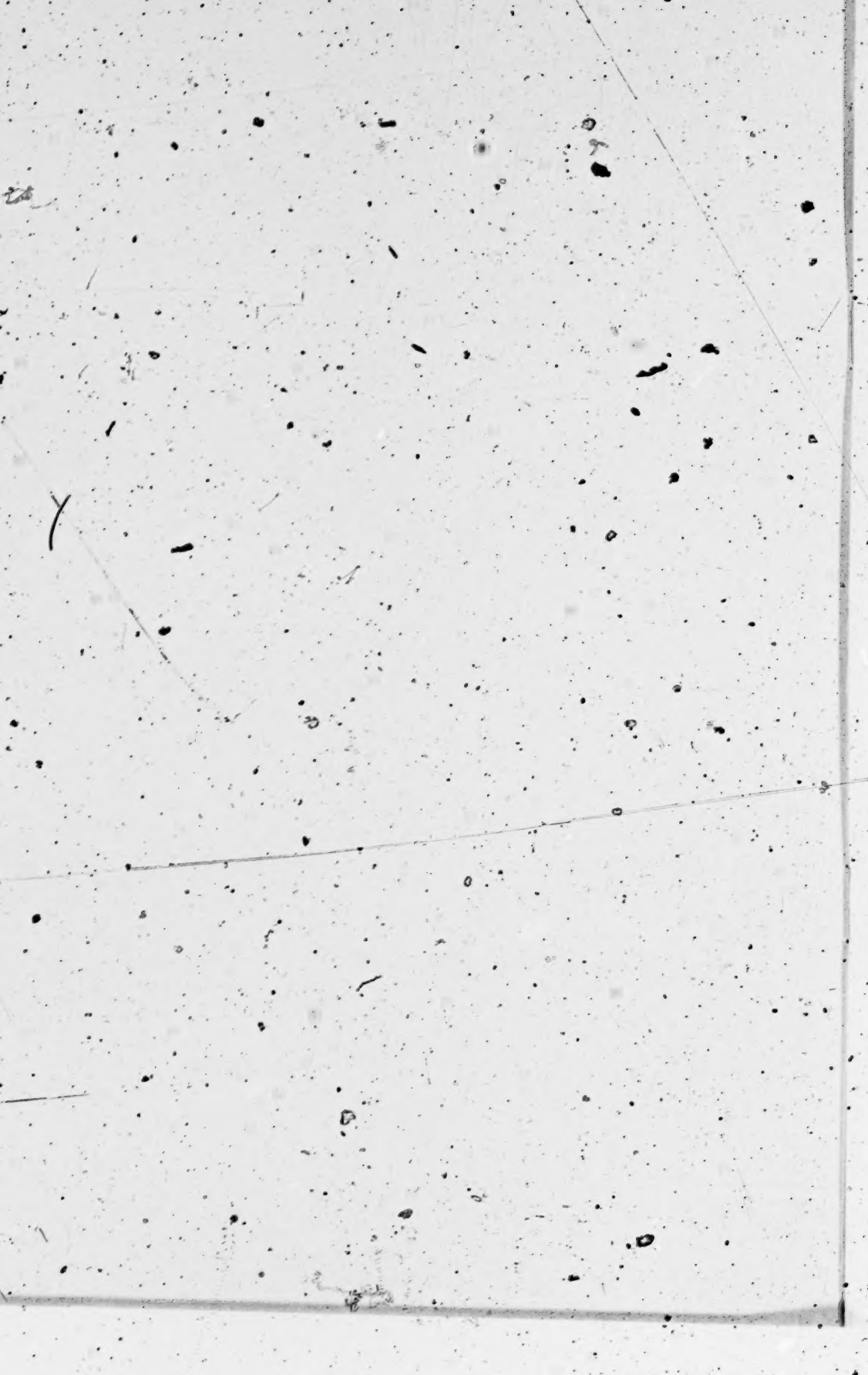
vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL,

Appellees

On Appeal From A Decision Of A Three-Judge Court In The United States District Court For The Western District Of North Carolina

APPENDIX



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DOCKET ENTRIES

Civil No. 2631

Date		*Proceedings*
2-27-70	No. 1	Filed petition for removal; bond on removal; copies of summons and complaint and restraining order.
2-27-70	No. 2	Filed notice of petition for removal and petition for removal of action from State court.
3- 2-70	No. 3	Filed application by plaintiffs for injunctive order—and defendants' application for order—three-judge court requested.
3-23-70	No. 3a	Filed answer of School Board to plaintiffs' complaint, with certificate of service.
3-24-70	No. 4	Filed plaintiffs' request for admissions, with attachments.
3-24-70	No. 5	Filed defendants' answer to request for admissions.
3-25-70	No. 6	Filed notification and request for designation of three-judge court.
3-25-70	No. 7	Filed designation of three-judge court: Judges Craven, Butzner and McMillan. Order signed by Chief Judge Haynesworth.

Date	*Proceedings*
3-25-70	No. 8. Filed motion of defendants with respect to membership of three-judge court.
3-25-70	No. 9. Filed order denying motion with respect to membership of three-judge court. Order signed by Chief Judge Haynesworth.
4-29-70	No. 10. Filed opinion of three-judge court—copies to counsel.
6-22-70	No. 11. Entered and filed final judgment (JBC-JDB-JBM): N. C. General Stat. 115-176.1 prohibiting assignment by race and bussing held unconstitutional; plaintiffs' motion to hold defendants in contempt denied; and various motions to dismiss are denied. Copies to counsel.
6-24-70	No. 12. Filed notice of appeal by plaintiffs to the Supreme Court, with certificate of service, and $250 bond for costs on appeal. Copies to William J. Waggoner and Benjamin S. Horack, counsel for defendants (and for School Board also).
7-22-70	Certifying record on appeal to Clerk, U. S. Supreme Court, Washington, D. C., in one volume. Copies of index and letter to counsel.

PLAINTIFFS COMPLAINT

NORTH CAROLINA
MECKLENBURG COUNTY

In The General
Court Of Justice
Superior Court Division

MRS. ROBERT LEE MOORE, for herself and for her minor children, OSCAR MOORE, LOIS MOORE, GRACE MOORE and JERRY MOORE, J. D. LITTLE, JR. and BETTIE C. LITTLE, for themselves and for their minor child, ALEC LITTLE, JOHN T. VERNON and NANCY H. VERNON, for themselves and for their minor children, PATTY VERNON, DAVID VERNON and ERIC VERNON, FLOYD T. BOYCE and LOUISE D. BOYCE, for themselves and for their minor children, LOU ANN BOYCE, LISA C. BOYCE and FLOYD T. BOST, JR., V. DON PERRIN and NANCY G. PERRIN, for themselves and for their minor children, VIC PERRIN, DONNA PERRIN and SANDRA PERRIN, JACK V. SCOTT and JANE B. SCOTT, for themselves and for their minor children, KENNY SCOTT and CRAIG SCOTT, MRS. MARTHA M. GLENN, for herself and for her minor child, CONNIE GLENN, WILLIAM M. HOOD, JR. and MARY D. HOOD, for themselves and for their minor children, ROBY WRENN HOOD, WILLIAM M. HOOD, III and MARY LIB HOOD, JOHN D. HASTY, for himself and for his minor children, JOHN D. HASTY, JR. and RENEE HASTY, AUBREY E. EASTERLIN, JR., for himself and for his minor step-children, BILLIE SEWELL, VICKIE SEWELL and KIM SEWELL, JAMES E. KING, for himself and for his minor children, LEIGH KING, CYNTHIA KING, SUSAN KING and JAN KING, MELVIN D. CHILDERS, JR., for himself and for his

minor child, CYNTHIA CHILDERS, THOMAS S. WEAVER and MARGARET S. WEAVER, for themselves and for their minor children, LIBBY WEAVER and TERRY WEAVER, TED E. MANNING and JACKIE MANNING, for themselves and for their minor child, STEVEN MANNING, HORACE DAVIS, JR. and EVELYN A. DAVIS, for themselves and for their minor children, HORACE DAVIS, III, EVELYN DAVIS and SUSAN DAVIS, ORRIE B. OATS, for herself and for her minor child, LEROY OATS, JR., THOMAS B. HARRIS, for himself and for his minor children, STEVE HARRIS and KELLY HARRIS, LORENE H. DRESSER, for herself and for her minor child, MICHELL DRESSER, JOHN H. HORNER, for himself and for his minor children, LAURA HORNER, JOHN HORNER and BRIAN HORNER, SHIRLEY C. NAIL, for herself and for her minor children, KIM NAIL and DEANA NAIL, G. DONALD ROBERSON, for himself and for his minor child, CHARLES ROBERSON, RAYMOND KENNETH YOUNG and EDNA R. YOUNG, for themselves and for their minor child, KATHY YOUNG, WILLIAM K. SUMMERVILLE, for himself and for his minor children, MICHAEL SUMMERVILLE and CRAIG SUMMERVILLE, JAMES L. KISER, for himself and for his minor child, KIMBERLY KISER, CHARLES N. BRILEY, for himself and for his minor children, ALLISON BRILEY and NATHANIEL BRILEY, WILLIAM R. DOWTIN and MARION W. DOWTIN, J. FRANK NEWTON and FRANCES M. NEWTON, W. BAINE MARTIN and ELIZABETH B. MARTIN, EDWARD S. FISHER and EMILY S. FISHER, THOMAS E. MCCABE and ANN R. MCCABE, LLOYD

ELLIS ZEDAKER, JR. and MARY FRANCES ZEDAKER, BRENDA A. HILL, BAXTER L. DIXON and HORACE N. WILLIAMSON,

Appellants

VS.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools,

Appellees

COMPLAINT

The plaintiffs, complaining of the defendants, say and allege:

(1) That the plaintiffs are citizens and residents of Mecklenburg County, North Carolina, most of them being also citizens and residents of the City of Charlotte.

(2) That the plaintiffs, other than the minor children above-named, are taxpayers of Mecklenburg County and the State of North Carolina, most of them being also taxpayers of the City of Charlotte.

(3) That there are included among the plaintiffs both white and Negro citizens, residents, parents, children and taxpayers.

(4) That the denials and compulsions and contemplated actions which are hereinafter described apply and directly and specifically affect the plaintiffs who are named above as parents and their children who are named above, and likewise to thousands of other parents and children in the City of Charlotte

and Mecklenburg County; that such other parents and children are so numerous that it is impracticable to bring them all before the Court; that such other parents and children constitute a class whose interests may properly and appropriately be represented by the parents and children who are plaintiffs herein; and that therefore the parents and children who are plaintiffs herein bring this suit both for themselves and in behalf of all other such parents and children

(5) That the denials and compulsions and contemplated actions which are hereinafter described affect all of the adult plaintiffs as taxpayers, and likewise all other taxpayers in the City of Charlotte and Mecklenburg County; that such other taxpayers are so numerous that it is impracticable to bring them all before the Court; that such other taxpayers constitute a class whose interests may properly and appropriately be represented by the taxpayers who are plaintiffs herein; and that the taxpayer plaintiffs therefore bring this suit both for themselves and in behalf of all other such taxpayers.

(6) That the defendant Charlotte-Mecklenburg Board of Education is a corporate body and a public agency of the State of North Carolina, created and existing under the laws of the State of North Carolina for the purpose of administering and operating the Charlotte-Mecklenburg public school system.

(7) That the defendant William C. Self is employed by the defendant Board of Education as full-time and active Superintendent of the Charlotte-

Mecklenburg school system, under the direction and control of the defendant Board of Education.

(8) That in obedience to the decision of the Supreme Court of the United States, rendered some fifteen years ago in the landmark case of *Brown vs. Board of Education*, the Charlotte-Mecklenburg school system has become and now is a racially unitary system, that is, access to any school in the system is not denied to any child on account of his race or color, and no compulsion to attend any particular school is imposed on any child because of his race or color, and in the Charlotte-Mecklenburg school system thousands of white children and thousands of Negro children are now attending the same schools and are taught in the same class rooms together.

(9) That there are 106 schools in the Charlotte-Mecklenburg school system, with a total enrollment of 84,542 children; that there are Negro children in attendance at all of these schools, except at 8 of them, and these 8 schools where no Negro children are now enrolled have an attendance of only 5,514 children as compared to the 84,542 children in the entire school system.

(10) That white children constitute approximately 71%, and Negro children constitute approximately 29%, of all the children in the Charlotte-Mecklenburg school system, and that thousands of white children and thousands of Negro children attend schools in the Charlotte-Mecklenburg system which have en-

rollments of white children and Negro children in approximately these very proportions.

(11) That, as the plaintiffs are informed and believe, a majority of the 100 largest school systems throughout all parts of the United States, have a lower ratio of white children and Negro children attending the same schools than is the case in the Charlotte-Mecklenburg public school system.

(12) That it has been judicially determined that in the Charlotte-Mecklenburg school system, each year any pupil is at liberty "to request assignment to another school"; that "no reason for transfer need be given"; and that "all transfer requests are honored", unless the school to which transfer is requested is "full".

(13) That it has further been judicially ascertained and determined that, in the Charlotte-Mecklenburg school system, there is "no racial discrimination" in the expenditure of "money" or the "providing" of "facilities"; and no "inequality based upon racial motives" with respect to the "quality" of "teachers", or "books" or "school buildings" or "athletics" or "school fees" or "free lunches" or "elective courses" or the "evaluation of students"; that the Charlotte-Mecklenburg Board of Education has "achieved a degree and volume" of inter-mixing of Negro children and white children in the Charlotte-Mecklenburg schools which is "apparently unsurpassed in these parts"; and that "the performance" of the Charlotte-Mecklenburg Board in this direction has "exceeded"

that of "any school board whose actions have been reviewed in appellate court decisions".

(14) That, as the plaintiffs are informed and believe, and despite all that is hereinabove set forth, the defendants, under the pressure of a Court directive, are about to institute and implement, in the Charlotte-Mecklenburg public school system, a regime under which the principle of disregarding the race and color of school children, and of imposing no restriction upon their choices, decisions or movements because of race or color, is to be abolished and in its place there is to be established and enforced, both now and hereafter, a principle that race and color shall control the assignment, attendance and movement of children in the Charlotte-Mecklenburg public school system, and that this is a compulsion which shall prevail over all other choices, decisions and considerations of any nature.

(15) That, as stated above, under the principle now controlling in the Charlotte-Mecklenburg schools access to any school is not denied to any child on account of his race or color, and compulsion to attend any certain school is not imposed on any child because of his race or color, but under the regime which the defendants are about to institute and implement, access to Charlotte-Mecklenburg schools will be denied, and throughout the future will continue to be denied, to the children who are plaintiffs herein, and to many thousands of other children in Charlotte and Mecklenburg County, solely on account of their

race and color, and compulsion to attend prescribed schools will be imposed, and throughout the future will continue to be imposed, upon the children who are plaintiffs herein, and upon many thousands of other children in Charlotte and Mecklenburg County, solely on account of their race and color.

(16) That such denials and compulsions, on the part of the defendants as agents of the State of North Carolina, against the plaintiffs and all whom the plaintiffs represent, will contravene the provisions of, the Constitution of the United States, of the Constitution of North Carolina, of statutes enacted by the Congress of the United States; of statute enacted by the General Assembly of North Carolina and of ruling made by the Supreme Court of the United States; and that such denials and compulsions will violate and destroy rights, liberties and freedoms assured and guaranteed to the plaintiffs, and to the citizens, residents, parents, children and taxpayers whom the plaintiffs represent, by the said Constitutions and statutes and Supreme Court ruling, namely:

By the Constitution of the United States, which provides, in its Fourteenth Amendment, that:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

By the Constitution of North Carolina, which provides, in its Article I, Section 18, that:

"Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed".

By the United States Civil Rights Act of 1964, which provides, 42 U.S.C. 2000c(b), that:

"'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance".

By the United States Civil Rights Act of 1964, which further provides, 42 U.S.C. 2000c-6(a), that:

"... [N]othing herein shall empower any official or Court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance".

By the General Statutes of North Carolina, which provide, Section 115-176.1, that:

"No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin .... No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins.

Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing".

By the decision of the Supreme Court of the United States in the case of *Brown vs. Board of Education*, which ruled, 347 U. S. 483 and 349 U. S. 294, that:

"[A]dmission to the public schools" shall be determined "on a non-racial basis".

(17) That the plaintiffs are informed and believe, as hereinabove stated, that in setting about to force the above described denials and compulsions upon the plaintiffs, and upon the citizens, residents, parents, children and taxpayers whom the plaintiffs represent, the defendants are acting under the pressure of a Court directive; that with all due respect for any Court directive, the plaintiffs nevertheless earnestly believe that the issues here involved are of wide and fundamental and lasting importance and should be considered and reconsidered to the fullest extent possible by the Courts at all levels, and the plaintiffs believe it to be eminently right and reasonable and appropriate that they, and those whom they represent, who are and will be the persons directly and vitally affected by the denials and compulsions here in question, should be heard with respect to the facts and the allegations and the issues which are now brought forward in this Complaint.

(18) That having hereinabove stated the overall nature and purpose of the denials and compulsions

which are about to be visited upon the plaintiffs, and all whom the plaintiffs represent, and having delineated the provisions of Federal and State Constitutions and of Federal and State statutes and of Supreme Court ruling which will be thereby contravened, the plaintiffs will now set forth particularly the announced specifics and applications of these denials and compulsions.

(19) That the objective of the regime which the defendants are about to institute and implement in the Charlotte-Mecklenburg schools is declared to be "that pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels [shall] have about the same proportion of black and white students"; that in order to accomplish this objective, the defendants are preparing to put into effect a combination of pupil assignment plans known as the Board Plan and the Finger Plan; that under such plans, the children named above, and thousands of other children in the Charlotte-Mecklenburg schools, white and black, will be forced to leave the schools where they now attend, and the communities where they live, and travel, by bus or other means of transportation, to other schools far distant and there be forced to attend school daily —all against their will—and all solely because of the race and color into which they were born.

(20) That such force and compulsion upon the children named above, and all whom they represent, will take from their liberties and their freedoms and

will shackle upon them instead a governmental dictation based wholly on race and color.

(21) That such force and compulsion will moreover constitute a gross discrimination as between those who are forced to move and those who are not.

(22) That with respect to the aforesaid pupil assignment plans and the implementing of them, it has been specified that "freedom of choice or freedom of transfer" shall "not be allowed" by the defendants to any child if the choice or the transfer has any effect of diminishing the degree of racial integration in any school; that freedom to choose only one way and freedom to transfer only in one direction is obviously not freedom at all, but the abolishment of freedom.

(23) That further with respect to the pupil assignment plans which are about to be imposed and implemented by the defendants, it has been specified "that no school be operated with an all-black or predominately black student body"; that there is no similar requirement with regard to all-white or predominately white schools; and that this beyond denial is racially discriminatory.

(24) That not only are the defendants about to establish and implement, in the Charlotte-Mecklenburg schools, the denials and compulsions hereinabove described, but it is also specified that they will enforce such denials and compulsions as "a continuing program" and will "maintain a continuing control over the race of children in each school, such as was

done for many decades before *Brown vs. Board of Education*; that the regime now about to be instituted is thus openly and avowedly a return to the principle of governing the admission and attendance of children in public schools according to race, which prevailed in many States prior to the Supreme Court's decision in *Brown vs. Board of Education* and which was thought to have been outlawed forever by that decision; and that not only are the chains of racial ratios thus about to be fastened upon the plaintiffs and those whom they now represent, but "continuing control" is to be maintained to assure that such ratios of race shall be locked upon all succeeding generations of children in the Charlotte-Mecklenburg schools, perpetually.

(25) That although the assignment and attendance of children in the public schools of North Carolina were determined and controlled according to race in years past, and although the effects of that denial of freedom were undoubtedly more adverse to Negro children than to white children, that is no reason now to reimpose the same wrongful principle of denial of freedom because of race upon white children and ironically and at the same time upon Negro children as well.

(26) That the pupil assignment and attendance plans which the defendants are now about to institute and implement will impose major inconveniences and burdens upon the children named above, and thousands of other children whom they represent, and will

bring about serious and harmful disruptions in their lives.

(27) That, as the plaintiffs are informed and believe, the implementing of the said pupil assignment and attendance plans will necessitate the purchase or rental by the defendants of large numbers of buses or other vehicles of transportation, and the abandonment of school buildings and the construction of other school buildings; and the extensive dismantling and replacement of school equipment and facilities—all at a cost of millions of dollars of public funds; that, as the plaintiffs are further informed and believe, the expenditure of public funds by the defendants in the initiation and launching of such plans and programs during the current year alone will range between $3,000,000.00 and $4,000,000.00, and such expenditure in succeeding years will greatly expand upon such amounts; that the expenditure of such funds will wrongfully injure and damage the plaintiff taxpayers and all other taxpayers of Charlotte and Mecklenburg County, in that the defendants, by such expenditures, will be, without lawful authority, diverting and misusing tax monies collected from the said taxpayers, or monies raised upon the credit of taxes to be collected from the said taxpayers, and will thereby wrongfully and unlawfully deprive the taxpayers of Charlotte and Mecklenburg County of their property in the amount of such expenditures.

(28) That above and beyond all other factors here pertinent, however, the paramount consideration is

that the defendants are about to establish and implement a system under which freedom is to be taken from the Charlotte-Mecklenburg school children, and in its place there is to be imposed governmental control of school assignments and school attendance strictly on the basis of the race and color of these children; and that this contravenes the provisions of Federal and State Constitutions and of Federal and State statutes, as set forth above, and is in direct and specific conflict with the fundamental ruling of the United States Supreme Court that "admissions to the public schools" shall be determined "on a non-racial basis".

(29) That unless the defendants are restrained by Court order, the denials and compulsions which they are about to impose and implement will work irreparable injury, for which there can be no adequate remedy or recompense at law, upon the plaintiffs, and the citizens, residents, parents, children and taxpayers whom the plaintiffs represent, in their lives, their property and their most cherished liberties.

WHEREFORE, the plaintiffs pray the Court for a temporary order restraining and enjoining the defendants from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which the children named above, or any children in the City of Charlotte or Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any pre-

scribed Charlotte-Mecklenburg public school because of their race or color.

And the plaintiffs pray that at the hearing upon such temporary order, the same be continued in force and effect until the trial of this cause upon the merits.

As to all issues properly triable before a jury, the plaintiffs respectfully request such jury trial.

WM. H. BOOE

WHITEFORD S. BLAKENEY

Attorneys for the Plaintiffs

[Verifications Omitted]

INJUNCTIVE ORDER ISSUED BY THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

NORTH CAROLINA	In The General Court of Justice
MECKLENBURG COUNTY	Superior Court Division

MRS. ROBERT LEE MOORE, ET ALS,
Plaintiffs

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools,
Defendants

} ORDER

THIS CAUSE coming before the undersigned upon the Complaint which has been duly verified by the plaintiffs, and the same having been fully considered;

And the Court being of the opinion that a temporary injunction and restraining order, as hereinafter set forth, should be issued by this Court;

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED:

That the defendants are hereby enjoined and restrained from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which any children in the City of Charlotte or

Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed Charlotte-Mecklenburg public school because of their race or color.

As a condition of this Order, it is directed that the plaintiffs shall file in the Office of the Clerk of Superior Court of Mecklenburg County, North Carolina, a Bond, approved by the said Clerk, in the amount of $1,000.00, by which the plaintiffs undertake and agree that in the event it is finally determined that this Order should not have been issued, then they will pay to the defendants such damages, up to the aforesaid amount, as the defendants may have suffered by reason of the issuance of this Order.

And the defendants are hereby directed to appear, in person or by counsel, before the Judge presiding over the Civil Term of Superior Court of Mecklenburg County, North Carolina, at the Mecklenburg County Court House, in Charlotte, North Carolina, on the 3rd day of March, 1970, at 9:30 o'clock A. M., and then and there show cause, if any they have, as to why this Order should not be continued in force and effect until the merits of this cause have been determined.

This 22nd of February, 1970.

s/ FRANK W. SNEPP

Judge of Superior Court

DEFENDANTS' PETITION FOR REMOVAL OF ACTION FROM STATE COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

MRS. ROBERT LEE MOORE, et al, *Plaintiffs,* vs. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of the Charlotte-Mecklenburg Schools, *Defendants;*	PETITION FOR REMOVAL Civil Action No. 2631

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA:

Petitioners, the Charlotte-Mecklenburg Board of Education, and William C. Self, Superintendent of Charlotte-Mecklenburg public schools, defendants herein, respectfully state to the Court:

1. On February 22, 1970, the plaintiffs instituted against the defendants in the Superior Court of Mecklenburg County, North Carolina, a civil action of which this court has original jurisdiction, in that rights or claims of right arising out of the Constitution and laws of the United States, statutes of the United States and other rights are alleged in the complaint as among the grounds asserted for this action:

2. Copies of all process, pleadings and orders which have been served upon the defendants in this action are attached hereto. A cash bond is also attached hereto, guaranteeing that the defendants will pay all costs and disbursements incurred by reason of the removal of this action into this court, in the event it is hereafter determined that this action was not removable to this court or was improperly removed to this court.

3. No pleadings or papers have been filed by the defendants in the aforesaid action.

4. The defendants are filing a copy of this petition with the Clerk of Superior Court of Mecklenburg County, North Carolina, and the defendants are giving written notice of the filing of this petition, and are furnishing a copy of the petition with such notice to the plaintiffs herein.

WHEREFORE, your petitioners, the defendants herein, request this court to assume full jurisdiction over the cause herein, as provided by law.

WILLIAM J. WAGGONER

William J. Waggoner
Weinstein, Waggoner, Sturges,
Odom and Bigger
1100 Barringer Office Tower
Charlotte, North Carolina

BENJ. S. HORACK

Benj. S. Horack
Ervin, Horack and McCartha
806 East Trade Street
Charlotte, North Carolina

[Verification Omitted]

PLAINTIFF'S APPLICATION FOR INJUNCTIVE ORDER IN UNITED STATES DISTRICT COURT

[Caption Omitted In Printing]

NOW COME the plaintiffs above-named and respectfully present to the Court:

1. That the General Statutes of North Carolina, Section 115-176.1, provide, as is set forth in the Complaint herein, that no person shall be "excluded from", nor "assigned" to or "compelled to attend", any public school in North Carolina "on account of" his race or color, nor "for the purpose of creating" any "balance or ratio" of race or color.

2. That, as the plaintiffs assert in their Complaint herein, such provisions are in harmony with the Constitution of the United States and specifically with the provisions of the Fourteenth Amendment of the Constitution, as interpreted and ruled by the Supreme Court of the United States in the case of *Brown vs. Board of Education*, 347 U. S. 483 and 349 U. S. 294.

3. That the said North Carolina statute contains a proviso, however, which purports to authorize a public school board to make such "assignment or reassignment" of pupils as it in its "sole discretion" may deem needful.

4. That as the plaintiffs are informed and believe, the defendants are implementing and putting into effect, in the Charlotte-Mecklenburg public schools,

certain plans and programs under which children living in Charlotte and Mecklenburg County, including the minor plaintiffs, will be excluded from schools and compelled to attend other schools solely on account of their race and color.

5. That it may be deemed that in such actions, the defendants are authorized and supported by the aforesaid proviso in the aforesaid statute, which permits them to assign and reassign school children in their "sole discretion"; that in such respect and in such application, however, the said proviso conflicts with the United States Constitution and specifically with the provisions of the Fourteenth Amendment to the Constitution, as interpreted and ruled by the Supreme Court of the United States in the case of *Brown vs. Board of Education* referred to above, 347 U.S. 483 and 349 U.S. 294.

WHEREFORE, the plaintiffs pray the Court for an injunctive order restraining and enjoining the operation and execution of the aforesaid proviso of the North Carolina statute above referred to, and any action by the defendants or any other State agents implementing the application and operation of the said statutory proviso as described above, upon the ground that the said statutory proviso as thus applied and implemented is unconstitutional; and to such end, the plaintiffs pray for the convening of a District Court of three Judges, to consider this Application upon all the matters and circumstances which

are set forth herein and in the Complaint filed by the plaintiffs in this cause, such Court being provided and required in such case by the laws and statutes of the United States.

WM. H. BOOE

WHITEFORD S. BLAKENEY

Attorneys for the Plaintiffs

DEFENDANTS' APPLICATION FOR INJUNCTIVE ORDER IN UNITED STATES DISTRICT COURT

[Caption Omitted In Printing]

NOW COME the defendants and respectfully show to the Court:

1. That this Court has heretofore directed these defendants to put into operation and effect certain plans and programs relating to the assignment and reassignment of pupils in the Charlotte-Mecklenburg public schools, in an action now pending in this Court entitled *James E. Swann, et al, v. Charlotte-Mecklenburg Board of Education, et al.*

2. That in order for the defendants to put such plans and programs into operation and effect, it will be necessary for the defendants compulsorily to require large numbers of pupils, because they are white children, to attend schools other than those which they now attend, and it will likewise be necessary for the defendants compulsorily to require large numbers of pupils, because they are Negro children, to attend schools other than those which they now attend.

3. That the plaintiffs, in their complaint herein, have asserted that such actions and requirements by the defendants will violate certain statutes enacted by the General Assembly of North Carolina, General Statutes of North Carolina, Section 115-176.1, and by

the Congress of the United States, 42 U.S.C. 2000c(b) and 42 U.S.C. 2000c-6(a), which statutes are more particularly set forth in plaintiffs' complaint.

4. That upon the basis of the said statutes, among other things, and their asserted conflict with the actions which this Court has directed the defendants to take, the Superior Court of Mecklenburg County, North Carolina, has restrained and enjoined the defendants from taking such actions.

5. That if the actions which this Court has directed the defendants to take are required by the Constitution of the United States, as the defendants understand this Court to have ruled in directing such actions, then the aforesaid statutes conflicting with this Court's ruling are also in conflict with the Constitution of the United States.

6. That the defendants do not know where the law rightly and truly is upon this conflict, and in an effort to resolve this dilemma, the defendants respectfully call upon the Court for an injunctive order enjoining and restraining the enforcement, operation and execution of the aforesaid statutes, and any action by State or Federal officers in the enforcing or executing or carrying out of said statutes, the ground of such injunctive order being the unconstitutionality of the said statutes.

7. The plaintiffs in the *Swann* case now seek to enjoin the enforcement of State court order which would have the effect of enjoining the enforcement and execution of said state statute on the grounds of its supposed unconstitutionality, which must be passed upon by a three-judge district court pursuant to 28 U.S.C. 22 81 et seq.

8. The desegregation order of this court in the *Swann* case does not effectively charge the defendant Board of Education with the daily task of going forward with plans for implementation of the Court directed plan; rather it specifies results to be accomplished on days certain. The order of the Superior Court specifically and directly prohibits any further action by the Board of Education with reference to implementation of the Court directed plan. The defendant Board of Education is therefore unable to proceed unless and until the order of the Honorable Frank Snepp is vacated, modified or dissolved. By virtue of removal, the Superior Court Judge is without power to take such action.

9. The United States District Court of the Western District of North Carolina is the ~~only court that~~ can resolve the defendants' dilemma by modifying, amending or vacating such order. To do so, in view of the plain meaning of the North Carolina General Statute 115-176.1, the United States District Court would be required to hold the North Carolina statute

unconstitutional or inapplicable. In view of the action of this Court in the Swann case in convening a three-judge court for this very purpose, the North Carolina statute cannot be considered inapplicable.

10. The defendants are not privileged to ignore any order issued by any court until such time as such orders may be lawfully modified, vacated or reversed. It appears that the most reasonable action would lie in bringing this matter on for hearing before a three-judge court pursuant to 28 U.S.C. 22 81 et seq.

11. In view of the fact that any relief to the defendants from the conflicting orders of this Court and of the Superior Court of Mecklenburg County, North Carolina, will involve consideration by the District Court of the constitutionality of said State statute and if same is determined to be unconstitutional, the issuance of restraining order in connection therewith, then only a three-judge court may properly proceed.

WHEREFORE, the defendants respectfully request the convening of a three-judge district court to pass upon the constitutionality of North Carolina General Statute 115-176.1 and 42 U.S.C. 2000c(b) and 42 U.S.C. 2000c-6(a) and further to pass upon the issuance of any interlocutory or permanent injunction restraining the enforcement, operation or execution thereof.

Respectfully submitted this 2nd day of March, 1970.

/s/ WILLIAM J. WAGGONER

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/s/ BENJ. S. HORACK

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ORDER OF UNITED STATES DISTRICT JUDGE, SUSPENDING STATE COURT INJUNCTIVE ORDER PENDING FINAL DETERMINATION BY THREE-JUDGE COURT OR BY SUPREME COURT

[Caption Omitted In Printing]

On Sunday, February 22, 1970, Judge Frank W. Snepp, in *Moore, et al, v. Charlotte-Mecklenburg Board of Education, et al,* a suit filed in the Superior Court of Mecklenburg County, North Carolina, signed a restraining order against the defendants. The order is of record. It appears to have been filed at 10:16 P.M. on Sunday night, February 22, 1970.

On Friday, February 27, 1970, the defendant Board of Education had a meeting. Without any inquiry of this court, the Board staff were instructed to comply with the state court order and to stop work on compliance with the order previously entered by this Court.

On February 28, 1970, counsel for all interested parties were notified that a hearing would be conducted on March 2, 1970, on motions to set aside or to restrain the effect of the Snepp order. Counsel for plaintiffs in the Moore case did not appear, but sent word through secretaries by telephone that they were occupied elsewhere.

The School Board attorneys have also filed on March 2, 1970, in the Swann case, Civil Action No. –

1974, a motion which, although it does not clearly say so, amounts to a request by the Board to this court to relieve the Board of the burden of Judge Snepp's order so that it will not interfere with the preparation and implementation of a desegregation plan.

The Fourth Circuit Court of Appeals has now, on March 5, 1970, issued an order which postpones pending appeal the implementation of the clustering, pairing and cross-bussing provisions of the February 5, 1970 order, but which directs the implementation of the rest of the February 5 order according to its terms. It would appear that the Board should without question follow the order of the Court of Appeals, rather than consider itself hampered by the Snepp order. Nevertheless, in order that there may be no possible question about the effect of the Snepp order henceforward, it is now, in the discretion of the court and in the furtherance and protection of the jurisdiction and orderly processes of this court, and pursuant to applicable statutes, ORDERED, ADJUDGED AND DECREED, that the order heretofore signed by Judge Snepp in Civil Action No. 2631 in the Superior Court of Mecklenburg County be, and it is hereby suspended and held in abeyance and of no force and effect pending the final determination by a three-judge court or by the Supreme Court of the issues which will be presented to the three-judge court on March 24, 1970.

IT IS FURTHER ORDERED, that the *Moore Case*, No. 2631, be referred to the three-judge court of March 24, 1970, for such hearing and determination as that court may find proper.

This the 6th day of March, 1970.

/s/ JAMES B. MCMILLAN

James B. McMillan
United States District Judge

DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT

[Caption Omitted In Printing]

The defendants, answering the complaint of the plaintiffs, allege and say:

1. The allegations contained in Paragraphs 1 through 5 are admitted upon information and belief.

2. The allegations contained in Paragraphs 6 through 14 are admitted.

3. With respect to the allegations contained in Paragraph 15, it is admitted that under the principle now controlling in the Charlotte-Mecklenburg schools, access to any school is not denied to any child on account of his race or color, and compulsion to attend any certain school is not imposed on any child because of his race or color, but under the direction of the Court, the defendants are about to institute and implement a plan for desegregation which will deny access to Charlotte-Mecklenburg schools to the plaintiffs and other children in this county, solely on account of their race and color and they will be compelled to attend schools now and in the future solely on account of their race and color. Except as herein admitted, the allegations contained in Paragraph 15 are denied.

4. With respect to the allegations contained in Paragraph 16, the factual information is admitted and

these defendants are neither required to admit nor deny conclusions stated therein.

5. With respect to the allegations contained in Paragraph 17 of the complaint, it is admitted that the defendants are acting upon the pressure of the Court directive with respect to further desegregation of the schools served by the system and that the issues here involved are of wide and fundamental and lasting importance and should be considered and reconsidered to the fullest extent possible by the courts at all levels. Except as herein admitted, the allegations contained in Paragraph 17 are denied and for further answer, the issues sought to be raised by the plaintiffs have and will continue to be raised by the defendants.

6. The allegations contained in Paragraph 18 do not contain factual statements and therefore are neither admitted nor denied.

7. The allegations contained in Paragraph 19 are admitted.

8. With respect to the allegations contained in Paragraph 20, it is admitted that the plan for desegregation ordered by the District Court will take from the plaintiffs and all whom they represent certain of their educational liberties and freedoms solely on account of race and color.

9. The allegations contained in Paragraph 21 are admitted.

10. The factual allegations contained in Paragraph 22 are admitted, the defendants being neither required to admit or deny the conclusions stated therein.

11. The factual allegations contained in Paragraph 23 of the complaint are admitted, the defendants being neither required to admit nor deny the conclusions stated therein.

12, The factual allegations contained in Paragraph 24 of the complaint are admitted, the defendants being neither required to admit nor deny conclusions therein stated.

13. The allegations contained in Paragraphs 25 and 26 are admitted.

14. The allegations contained in Paragraph 27 of the complaint are admitted except it is denied that the defendants will voluntarily without lawful authority divert and misuse tax monies collected from the said taxpayers, or monies raised upon the credit of taxes to be collected from said taxpayers.

15. That the allegations contained in Paragraph 28 of the complaint are admitted.

16. As to allegations contained in Paragraph 29, the same are denied, the true facts being that the defendants are exercising all legal rights and remedies available to ensure that the rights of no one will be violated under the Constitution and laws of the United States and North Carolina.

WHEREFORE, the defendants pray the Court to deny the relief sought by the plaintiffs and to dismiss their action and further that the defendants have and recover their costs.

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NOTIFICATION AND REQUEST FOR DESIGNATION OF THREE-JUDGE COURT

[Caption Omitted In Printing]

It appears from the Application filed by the plaintiffs (copy of which is attached hereto) that this matter does or may involve the constitutionality or the constitutionality of the application of a state statute, or a portion thereof, and that pursuant to Title 28 U.S.C.A., it should be heard by a district court of three judges.

NOW, THEREFORE, it is respectfully requested that the Chief Judge of the United States Court of Appeals for the Fourth Circuit designate two other judges, at least one of whom shall be a circuit judge, to serve with the undersigned district judge as members of the court to hear and determine the action.

This the 23rd day of March, 1970.

/s/ JAMES B. MCMILLAN

James B. McMillan
United States District Judge

DESIGNATION OF THREE-JUDGE COURT

[Caption Omitted In Printing]

It appearing to the undersigned Chief Judge of the Fourth Judicial Circuit of the United States that a civil action as above-entitled is now pending in the United States District Court for the Western District of North Carolina, and that a motion and application for restraining order and other relief have been filed in this action which do or may raise the question of the constitutionality of Section 115-176.1 of the General Statutes of North Carolina, commonly spoken of as the "anti-bussing" statute and which application and motion also raise other questions; and that application for relief as set out in the pending motion was made to James B. McMillan, United States District Judge for the Western District of North Carolina, who has notified the undersigned, pursuant to Section 2284 of Title 28, United States Code, of the pendency of such application to the end that a court of three judges may be constituted in accordance with Section 2281, Title 28, United States Code.

Now, therefore, I do hereby designate Honorable J. Braxton Craven, Jr., United States Circuit Judge, Fourth Judicial Circuit, and Honorable John D. Butzner, Jr., United States Circuit Judge, Fourth Judicial Circuit, to serve with the Honorable James B. McMillan in the hearing and determination of the above-entitled action, as provided by law, the three to constitute a district court of three judges as provided by Section 2284, Title 28, United States Code.

This the 24th day of March, 1970.

CLEMENT HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

PLAINTIFFS' REQUEST FOR ADMISSIONS (EXHIBITS THERETO ATTACHED ARE PRINTED IN SEPARATE VOLUME, ENTITLED SUPPLEMENT TO APPENDIX)

[Caption Omitted In Printing]

As is authorized by the Federal Rules of Civil Procedure, the plaintiffs respectfully request of the defendants that they admit the truth of the following statements and the genuineness of the following documents:

1. That the attached map, shown on Page 8B of The Charlotte Observer of March 22, 1970, is a substantially accurate depiction of some of the restructured elementary school districts in the Charlotte-Mecklenburg public school system, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970.

2. That the attached sheets are substantially accurate individual depictions of the restructured elementary school districts shown on the aforesaid map, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970.

3. That the depictions in "1" and "2" above, do not show the elementary school districts in the Charlotte-Mecklenburg public school system which are both restructured and "paired" with other elementary school districts, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970.

4. That the attached map, shown on Page 31 of the March 16, 1970, issue of the U. S. News & World Report, is a substantially accurate depiction of the "pairing" of schools in the Charlotte-Mecklenburg public school system for purposes of assigning children to schools outside their districts, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970.

5. That the restructuring of school districts in the Charlotte-Mecklenburg public school system, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970, is shaped and controlled by racial considerations, that is, by a conscious and purposeful effort to obtain and to require, by assignment within such restructured districts, as nearly as possible a ratio of 70% white children and 30% black children in each school.

6. That the "pairing" of schools in the Charlotte-Mecklenburg public school system for purposes of assigning children to schools outside their districts, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970, is shaped and controlled by racial considerations, that is, by a conscious and purposeful effort to obtain and to require, by assignment of children outside their districts, as nearly as possible a racial ratio of 70% white children and 30% black children in each school.

WM. H. BOOE

W. S. BLAKENEY

Attorneys for the Plaintiffs

DEFENDANTS' ANSWER TO REQUEST FOR ADMISSIONS

[Caption Omitted In Printing]

Pursuant to the Federal Rules of Civil Procedure, the defendant, the Charlotte-Mecklenburg Board of Education, responding serially to the six requests, respond as follows:

1. With respect to the request contained in Paragraph 1, the same is admitted.

2. Request for Admission No. 2 is admitted.

3. The statement contained in Request No. 3 is admitted.

4. With respect to Request No. 4, the map referred to is a substantially accurate depiction of the pairing of schools in the Charlotte-Mecklenburg public school system for the purpose of assigning pupils to schools outside of their districts, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970. In making this admission, the defendants state that said map is schematic and does not appear to be accurate to scale.

5. Statements contained in Request No. 5 are admitted.

6. Statement contained in Request No. 6 is admitted and as the orders of the District Court so indicate.

Respectfully submitted this 23rd day of March, 1970.

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[Verification Omitted]

OPINION OF THREE-JUDGE COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil No. 1974

JAMES E. SWANN, et al., *Plaintiffs,*

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KEERY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, *Defendants,*

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON

ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE, *Additional Parties-Defendant.*

Civil No. 2631

MRS. ROBERT LEE MOORE, et al., *Plaintiffs,*

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools, *Defendants.*

THREE-JUDGE COURT

(Heard March 24, 1970 Decided April 29, 1970.)

Before CRAVEN and BUTZNER, Circuit Judges, and McMILLAN, District Judge.

Mr. J. LeVonne Chambers (Chambers, Stein, Ferguson & Lanning) and James M. Nabrit, III, for Plaintiffs in No. 1974; Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) and Mr. Benjamin Horack, for Defendants in No. 1974; Mr. Ralph Moody, Deputy Attorney General, and Mr.

Andrew A. Vanore, Jr., Assistant Attorney General, for State Defendants and Additional Parties-Defendant in No. 1974; and Mr. William H. Booe and Mr. Whiteford S. Blakeney, for other Additional Parties-Defendant in No. 1974.

Mr. William H. Booe and Mr. Whiteford S. Blakeney for Plaintiffs in No. 2631; and Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) for Defendants in No. 2631.

CRAVEN, Circuit Judge:

This three-judge district court was convened pursuant to 28 U.S.C. § 2281, et seq. (1964), to consider a single aspect of the above-captioned case: the constitutionality and impact of a state statute, N. C. Gen. Stat. § 115-176.1 (Supp. 1969), known as the anti-bussing law, on this suit brought to desegregate the Charlotte-Mecklenburg school system. We hold a portion of N. C. Gen. Stat. § 115-176.1 unconstitutional because it may interfere with the school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment.

I.

On February 5, 1970, the district court entered an order requiring the Charlotte-Mecklenburg School Board to desegregate its school system according to a court-approved plan. Implementation of the plan could require that 13,300 additional children be

bussed.[1] This, in turn, could require up to 138 additional school buses.[2]

Prior to the February 5 order, certain parties filed a suit, entitled *Tom B. Harris, G. Don Roberson, et al. v. William C. Self, Superintendent of Charlotte-Mecklenburg Schools and Charlotte-Mecklenburg Board of Education*, in the Superior Court of Mecklenburg County, a court of general jurisdiction of the State of North Carolina. Part of the relief sought was an order enjoining the expenditure of public funds to purchase, rent or operate any motor vehicle for the purpose of transporting students pursuant to a desegregation plan. A temporary restraining order granting this relief was entered by the state court, and, in response, the *Swann* plaintiffs moved the district court to add the state plaintiffs as additional parties defendant in the federal suit, to dissolve the state restraining order, and to direct all parties to cease interfering with the federal court mandates. Because it appeared that the constitutionality of N. C. Gen. Stat. § 115-176.1 (Supp. 1969) would be in question, the district court requested designation

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[1]On March 5, 1970, the Fourth Circuit Court of Appeals stayed that portion of the district court's order requiring bussing of students pending appeal to the higher court.

[2]There is a dispute between the parties as to the additional number of children who will be bussed and as to the number of additional buses that will be needed. For our purposes, it is immaterial whose figures are correct. The figures quoted are taken from the district judge's supplemental findings of fact, filed March 21, 1970.

of this three-judge court on February 19, 1970. On February 25, 1970, the district judge granted the motion to add additional parties. Meanwhile, on February 22, 1970, another state suit, styled *Mrs. Robert Lee Moore, et al. v. Charlotte-Mecklenburg Board of Education and William C. Self, Superintendent of Charlotte-Mecklenburg Schools*, was begun. In this second state suit, the plaintiffs also requested an order enjoining the school board and superintendent from implementing the plan ordered by the district court on February 5. The state court judge issued a temporary restraining order embodying the relief requested, and on February 26, 1970, the *Swann* plaintiffs moved to add Mrs. Moore, *et al.*, as additional parties defendant in the federal suit. On the same day, the state defendants filed a petition for removal of the *Moore* suit to federal court. On March 23, 1970, the district judge requested a three-judge court in the removed *Moore* case, and this panel was designated to hear the matter. All the cases were consolidated for hearing, and the court heard argument by all parties on March 24, 1970.

II.

N. C. Gen. Stat. § 115-176.1 (Supp. 1969) reads:

> Assignment of pupils based on race, creed, color or national origin prohibited.—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national orgin. No school attendance

district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

It is urged upon us that the statute is far from clear and may reasonably be interpreted several different ways.

(A) Plaintiffs read the statute to mean that the school board is prevented from complying with its duty under the Fourteenth Amendment to establish a unitary school system. See, *e.g., Green v. County School Bd. of New Kent County,* 391 U.S. 430, 439 (1968). In support of this contention, plaintiffs argue that the North Carolina General Assembly passed § 115-176.1 in response to an April 23, 1969, district court order, which required the school board to submit a plan to desegregate the Charlotte schools for the 1969-70 school year. Under plaintiffs' interpretation of the statute, the board is denied all desegration tools except nongerrymandered geographic zoning and freedom of choice. Implicit in this, of course, is the suggestion that zoning and freedom of choice will be ineffective in the Charlotte context to disestablish the asserted duality of the present system.

(B) The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race. Implicit in this argument is that any school system is *per se* unitary if it is zoned according to neighborhood patterns that are not the result of officially sanctioned racial discrimination. Although the Attorney General emphasizes the expression of state policy by the Legislature in favor of the neighborhood school concept, he recognizes, of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus, the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation to nongerrymandered geographic zoning and freedom of choice.

(C) The school board's interpretation of the statute is more ingenious. The board concedes that the statute prohibits assignment according to race, assignment to achieve racial balance, and involuntary bussing for either of these purposes, but contends that the facial prohibitions of the statute

only apply to prevent a school board from doing more than necessary to attain a unitary system. The argument is that since the statute only begins to operate once a unitary system has been established, it in no way interferes with the board's constitutional duty to desegregate the schools. Counsel goes on to insist that Charlotte-Mecklenburg presently has a unitary system and, therefore, that the state court constitutionally applied the statute to prevent further unnecessary racial balancing.

(D) Plaintiffs in the *Harris* suit contend (1) that in 42 U.S.C. §§ 2000c(b) and 2000c-6(a)(2) (1964)[3] Congress expressly prohibited assignment and bussing to achieve racial balance, (2) that to compel a child to attend a school on account of his

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[3] § 2000c.

As used in this subchapter—

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

§ 2000c-6(a):

(2) [P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

race or to compel him to be involuntarily bussed to achieve a racial balance violates the principle of *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954), and (3) that N.C. Gen. Stat. § 115-176.1 merely embodies the principle of the neighborhood school in accordance with *Brown* and the Civil Rights Act of 1964. We may dispose of the first contention at once. The statute "cannot be interpreted to frustrate the constitutional prohibition [against segregated schools]." *United States v. School Dist. 151 of Cook Co.*, 404 F. 2d 1125, 1130 (7th Cir. 1968).

(E) Plaintiffs in the *Moore* suit argue that the district court order of February 5, 1970, was in contravention of *Brown* and, therefore, that the state court order in their suit was justified. However, the *Moore* plaintiffs also argue that certain parts of the second and third paragraphs in the state statute are unconstitutional because they give the school board the authority to assign children to schools for whatever reasons the board deems necessary or sufficient. The *Moore* plaintiffs interpret these portions of the statute as permitting assignment and bussing on the basis of race contrary to *Brown* and the Fourteenth Amendment.

III.

Federal courts are reluctant, as a matter of comity and respect for state legislative judgment and discretion, to strike down state statutes as unconstitutional, and will not do so if the statute reasonably can

be interpreted so as not to conflict with the federal Constitution. But to read the statute as innoculously as the school board suggests would, we think, distort and twist the legislative intent. We agree with plaintiffs and the Attorney General that the statute limits the remedies otherwise available to school boards to desegrate the schools. The harder question is whether the limitation is valid or conflicts with the Fourteenth Amendment. We think the question is not so easy, and the statute not so obviously unconstitutional, that the question may lawfully be answered by a single federal judge, see *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Bailey v. Patterson*, 369 U.S. 31 (1962), and we reject plaintiffs' attack upon our jurisdiction. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965); C. Wright, Law of Federal Courts § 50 at 190 (2d ed. 1970).

In *Green v. County School Bd. of New Kent Co.*, 391 U.S. 430 (1968), the Supreme Court declared that a school board must take effective action to establish a unitary, nonracial system, if it is not already operating such a system. The Court neither prohibited nor prescribed specific types of plans, but, rather, emphasized that it would judge each plan by its ultimate effectiveness in achieving desegregation. In *Green* itself, the Court held a freedom-of-choice plan insufficient because the plan left the school system segregated, but stated that, under the circumstances existing in New Kent County, it appeared that the school board could achieve a unitary system

either by simple geographical zoning or by consolidating the two schools involved in the case. 391 U.S. at 442, n. 6. Under *Green* and subsequent decisions, it is clear that school boards must implement plans that work to achieve unitary systems. *Northcross v. Bd. of Ed. of the Memphis City Schools*, U.S. , 38 L.W. 4219 (1970); *Alexander v. Holmes Co. Bd. of Ed.*, 396 U.S. 19 (1969). Plans that do not produce a unitary system are unacceptable.

We think the enunciation of policy by the legislature of the State of North Carolina is entitled to great respect. Federalism requires that whenever it is possible to achieve a unitary system within a framework of neighborhood schools, a federal court ought not to require other remedies in derogation of state policy. But if in a given fact context the state's expressed preference for the neighborhood school cannot be honored without preventing a unitary system, it is

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The reach of the Court's mandate is not yet clear:

> [A]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

Northcross v. Bd. of Ed. of the Memphis City Schools, — U. S.—, 38 L.W. at 4220 (1970) (Chief Justice Burger, concurring). For our purposes, it is sufficient to say that the mandate applies to require "reasonable" or "justifiable" solutions. *See generally* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965).

the former policy which must yield under the Supremacy Clause.

Stated differently, a statute favoring the neighborhood school concept, freedom-of-choice plans, or both can validly limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system. That it may or may not depends upon the facts in a particular school system. The flaw in this legislation is its rigidity. As an expression of state policy, it is valid. To the extent that it may interfere with the board's performance of its affirmative constitutional duty to establish a unitary system, it is invalid.

The North Carolina statute, analyzed in light of these principles, is unconstitutional in part. The first paragraph of the statute reads:

> No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown* I).

The third paragraph of the statute reads:

> The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

This paragraph merely allows the school board non-invidious discretion to assign students to schools for valid administrative reasons. As we read it, it does not relate to race at all and, so read, is constitutional.

The fourth paragraph provides:

> The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

This paragraph relieves school boards from compliance with the statute where they are implementing voluntarily adopted freedom-of-choice plans within their systems. It does not require the boards to adopt freedom of choice in any particular situation, but leaves them free to comply with their constitutional duty by any effective means available, including, where it is appropriate, freedom of choice. So interpreted, the paragraph is constitutional.

The second paragraph of the statute contains the constitutional infirmity. It reads:

> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The first sentence of the paragraph presents no greater constitutional problem than the third and fourth paragraphs of the statute, discussed above. It allows school boards to establish a geographically zoned neighborhood school system, but it does not require them to do so. Consequently, this sentence does not prevent the boards from complying with their constitutional duty in circumstances where zoning and

neighborhood school plans may not result in a unitary system. The clause in the first sentence permitting assignment for "any other reason" in the board's "sole discretion" we read as meaning simply that the school boards may assign outside the neighborhood school zone for noninvidious administrative reasons. So read, it presents no difficulty. The second and third sentences are unconstitutional. They plainly prohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially "balance" the school system. *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968), *Brown v. Bd. of Ed. of Topeka*, 349 U.S. 294 (1955) (*Brown* II), and *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown* I), require school boards to consider race for the purpose of disestablishing dual systems.

The Constitution is not color-blind with respect to the affirmative duty to establish and operate a unitary school system. To say that it is would make the constitutional principle of *Brown* I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction that boards must take steps adequate to abolish dual systems. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking

affirmative steps to desegregate its system, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear, see *Northcross v. Bd. of Ed. of the Memphis City Schools*, —U.S.—, 38 L.W. at 4220 (1970) (Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.

Although we hold these statutory prohibitions unconstitutional as violative of equal protection, it does not follow that "bussing" will be an appropriate remedy in any particular school desegregation case. On this issue we express no opinion, for the question is now on appeal to the United States Court of Appeals for the Fourth Circuit and is not for us to decide.

It is clear that each case must be analyzed on its own facts. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article VI, clause 2 of the Constitution).

V. [sic]

As we have no cause to doubt the sincerity of the various defendants, the plaintiffs' motion to hold them in contempt for interference with the district court's orders and their request for an injunction against enforcement of the statute will be denied. We believe the defendants, including the state court plaintiffs, will, pending appeal, respect this court's judgment, which applies statewide with respect to the constitutionality of the statue.

Several of the parties have moved to be dismissed from the case, alleging various grounds in support of their motions. Because of the view we take of this suit and the limited relief we grant, the motions to dismiss become immaterial. The school board is undeniably a proper party before the court on the constitutional issue, since it is a party to the desegregation

suit. We can, therefore, consider and adjudge the validity of the statute, regardless of the position of the other parties. That we consider the substantive arguments of all the parties in no way harms those who have moved to be dismissed.

An appropriate judgment will be entered in accordance with this opinion.

FINAL JUDGMENT OF THREE-JUDGE COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA, CHARLOTTE DIVISION

CIVIL NO. 1974

JAMES E. SWANN, et al., *Plaintiffs,*

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, *Defendants,*

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R.

CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Civil No. 2631

MRS. ROBERT LEE MOORE, et al.,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools,

Defendants.

FINAL JUDGMENT

Upon reconsideration of our memorandum opinion filed April 28, 1970, we withdraw Part V.

It is now ORDERED, ADJUDGED and DECREED that the following portion of N. C. General Statute 115-176.1 prohibiting assignment by race and bussing be and hereby is held unconstitutional, void, and of no effect:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in con-

travention of this article is prohibited, and public funds shall not be used for any such bussing.

All parties are hereby enjoined from enforcing, or seeking the enforcement of, the foregoing portion of the statute.

Plaintiffs' motion to hold defendants in contempt is denied; the various motions to dismiss are denied.

This 22 day of June, 1970.

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

JOHN D. BUTZNER, JR.
United States Circuit Judge

JAMES B. MCMILLAN
United States Circuit Judge [sic]

PLAINTIFFS' NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

MRS. ROBERT LEE MOORE, ET AL,
Plaintiffs
vs.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools,
Defendants

Civil Action No. 2631

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

On June 22, 1970, a "Final Judgment" was entered by the three-judge district court in this cause.

The plaintiffs hereby give notice of appeal, and do hereby appeal, from such Judgment to the Supreme Court of the United States.

This appeal is taken, and this Notice of Appeal is entered, pursuant to the provisions of 28 U.S.C. 1253.

This 23rd day of June, 1970.

WM. H. BOOE

W. S. BLAKENEY

Attorneys for the Plaintiffs